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July 6, 2009

VIA ELECTRONIC FILING AND FIRST CLASS MAIL
Public Comments Processing
Attn: FWS-R6-ES-2009-0021
Division of Policy and Directives Management
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Dear Sir or Madam:

The American Petroleum Institute ("API") appreciates the opportunity to comment on the Notice of 90-Day Petition Finding and Initiation of Status Review published in the May 7, 2009 Federal Register at 74 Fed. Reg. 21301 ("Federal Register Notice"), which found that listing of the American pika (*Ochotona princeps*) may be warranted under the Endangered Species Act of 1973, as amended (the "Act"). The U.S. Fish and Wildlife Service ("Service") found "substantial scientific or commercial information" supporting the petition by the Center for Biological Diversity, and therefore initiated a species status review on whether the American pika should be listed. Specifically, the Service concluded in the Federal Register Notice that global climate change, caused by greenhouse gases ("GHGs"), may at some point in the future adversely impact the survival of the American pika. 74 Fed. Reg. at 21309.[1]

API is a national trade association representing more than 400 member companies involved in all aspects of the oil and natural gas industry. Those members include producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources

[1] Although the Service based its finding on "the present or threatened destruction, modification, or curtailment of its habitat or range [16 U.S.C. 1533(a)(1)(A)] as a result of effects related to global climate change," the record upon which the Service makes this finding demonstrates no "present" threat to the American pika's habitat at all, only a potential threat to its habitat many decades in the future, absent intervening factors, based on global climate change.

for consumers. While API member companies conduct operations within the 10-state area in which the American pika may be found, in virtually all cases these operations occur outside the specific range of the American pika. The Federal Register Notice does not suggest that exploration and production activities of the oil and natural gas industry pose a threat to the species through any direct impacts.

API believes it would be inconsistent with the Act to list the American pika as "threatened" or "endangered" based solely on the effects of global climate change, if any, on the species' habitat. Here, the only one of the five listing factors for which the Service found there to be a credible threat to the American pika was the potential adverse effects of global climate change in the future on the American pika's habitat. This potential threat, however, is not within the "reasonably foreseeable future," as that term has been defined and applied under the Act. Hence, the American pika does not satisfy the definition of "threatened" under the Act, much less the more immediate threats necessary for finding a species to be "endangered."[2]

Based on "the best available science," including the IPCC Report on which the Service relies, the projected threats from global climate change are not expected to occur until many decades in the future, and even then only assuming no significant intervening actions to address those potential threats. These threats are beyond the "reasonably foreseeable future" for purposes of the definition of "threatened" under the Act. The IPCC Report, on which the petitioners rely and which the Service finds to be the "best available science," projects warming trends over the next century. The average life span of an American pika is 2-3 years, and few live to be 4. *See* 74 Fed. Reg. at 21303. In past listing decisions, the Service has used, at most, 10 generations to determine "reasonably foreseeable future." *See, e.g.,* Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition To List the Colorado River Cutthroat Trout as Threatened or Endangered, 72 Fed. Reg. 32,589, 32,599 (June 13, 2007) ("The Act does not define the term 'foreseeable future.' However, we consider the 'foreseeable future' to be 20 to 30 years, which equates to approximately 4 to 10 [Colorado River cutthroat trout] generations, depending on the productivity of the environment.") Hence, the potential threats addressed in the record occur well beyond the "reasonably foreseeable future" for this species.

The IPCC Report is premised on various projected emissions scenarios in the future. Given the current activity relating to regulation of GHGs domestically and internationally, including the United States House of Representatives having just passed a bill on June 26, 2009 that would dramatically limit the future emissions of GHGs, the IPCC Report's conclusions may not be accurate in 100 years. As a result, these conclusions cannot be considered reliable for purposes of making current listing determinations under the ESA. That is, IPCC itself acknowledges that these threats may not materialize over the next century if greenhouse gas emissions are addressed domestically or internationally. As the January 16, 2009 Solicitor's Opinion on the meaning of "reasonably foreseeable future" notes, "the foreseeable future describes the extent

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[2] By definition under the Act, no species can currently be found to be "endangered" based on the effects of global climate change, because it is not a current threat to any species. If a threat at all, the adverse effects of global climate change on habitat are ones that may occur decades in the future. Hence, in order to determine whether a species may be considered "threatened" under the Act, the Service must at a minimum determine whether any such threat from global climate change may occur within the "reasonably foreseeable future" for that species.

to which the Secretary can, in making determinations about the future conservation status of the species, reasonably rely on predictions about the future." *Id.* at 14. Here, the petitioners argue that the absence of an enforceable GHG treaty and the lack of U.S. ratification are primary causes of the threat to the American pika. *See* 74 Fed. Reg. 21308/2 -/3 (discussing the petitioner's views of the inadequacy of existing regulatory mechanisms). That discussion deals almost entirely with the lack of an adequate GHG regulatory program. "The petitioner stresses that immediate legislative action is necessary to save the American pika because scientists warn that we are approaching emission levels that would cause dangerous climate change." *Id.* at 21308. Hence, the petitioners acknowledge here that the response to global climate change over the immediate future will determine whether the predicted threats to the habitat of the American pika may in fact occur in the following decades. By definition, then, the threats posed by global climate change are beyond the "reasonably foreseeable future."

At a minimum, as noted above, there is no basis for making a finding of "endangerment" under the Act for any species due to global climate change, including the subspecies of American pika addressed in the petition, because these threats are forecasted to occur decades into the future, and presume inaction over the near term. Even if adverse population trends are found to occur at some point decades in the future, as the Solicitor's January 16, 2009 Opinion notes, "after a species is listed as threatened because of a negative population trend, new conservation measures may be put in place that then allow the Secretary to reliably predict that the population trend will be reversed before the species becomes an endangered species." *Id.* at 14 n.12.

Moreover, in this particular case there appears to be a valid scientific argument in the record against listing the American pika for any purposes under the Act. On page 21305/2, the preamble notes that American pikas are currently found in two areas (Craters of the Moon and Lava Beds National Monuments) that are much warmer than the alpine meadow habitat areas that are the focus of the petition. In fact, the current ambient temperatures in these areas appear to be higher than the warming trends forecasted by the IPCC over the next several decades. And this warming trend provides the supposed substantial scientific information warranting listing of the American pika. This record evidence supports a finding that American pikas are not as sensitive to local microclimatological conditions as the petition suggests. Because ambient temperatures are critical to the Service's finding in this case, this inconsistency in the record evidence must be addressed by the Service in any 12-month finding.

Finally, when the Service makes its decision whether to list the American pika, it must consider not only the "best available scientific and commercial information," but it must also establish a causal connection between factors asserted as affecting the health of species populations, and the Service's determinations concerning the status of those populations. As the Service recognizes, "[t]he best scientific data available today do not allow us to draw a causal connection between GHG emissions from a given facility and effects posed to listed species or their habitats, nor are there sufficient data to establish that such impacts are reasonably certain to occur." Dale Hall, Director of the U.S. Fish and Wildlife Service, Memorandum, to Regional Directors, *Expectations for Consultations on Actions that Would Emit Greenhouse Gases*, May 14, 2008 at 1-2 ("Hall Memorandum").

In the Federal Register Notice, the Service requested information addressing three potential areas of inquiry: (a) biological and conservation information regarding the species; (b) listing factors under the Act; and (c) critical habitat information, in the event a decision to list is made. But these subsidiary issues are irrelevant in light of the fact that, as a threshold matter, the Administration has expressly determined that listing species under the Act is inappropriate to address impacts arising solely from global climate change. Interior Department May 8, 2009 Announcement Retaining Special 4(d), Rule, at http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=20FB90B6-A188-DB01-04788E0892D91701 (Secretary Salazar: "We must do all we can to help the polar bear recover, recognizing that the greatest threat to the polar bear is the melting of Arctic sea ice caused by climate change. However, the Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions. Instead, we need a comprehensive energy and climate strategy that curbs climate change and its impacts – including the loss of sea ice. Both President Obama and I are committed to achieving that goal.") The Administration is focused on developing a comprehensive regulatory plan to deal with global climate change, and this has officially been determined by the President to be more efficacious than using the Act to protect species that may be endangered by global climate change.

Looking beyond the issues raised in the Federal Register Notice, if the Service decides to list the American pika as "threatened" for any reason,[3] any such listing should acknowledge the absence of scientific data demonstrating effects on this or other species from particular sources of GHG. For this reason, the Secretary also should exercise his discretion under Section 4(d) of the Act to exclude the application of take requirements for GHG-emitting projects. *Sweet Home v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993), *rev'd on other grounds*, 515 U.S. 687 (1995) (the Secretary has "discretion to apply any or all of the § 1538(a)(1) prohibitions to threatened species without obligating it to support such actions with findings of necessity [under the 4(d) Rule]").[4] Moreover, given the inherent difficulties in establishing any impact of specific emissions sources on climate, it would be similarly appropriate for the Service not to impose Section 7 consultation obligations with respect to individual operating permits based solely on asserted impacts of GHG emissions. Both approaches, premised on the impossibility of attributing global climate change impacts to specific U.S. emissions sources, would be entirely consistent with the Hall Memorandum.

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[3] As explained above, API believes there is no basis for listing any pika species as "endangered" under the Act based solely upon potential threats from global climate change decades into the future.

[4] Under the Supreme Court's decision in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, agencies have inherent flexibility to interpret the statutes they are charged with implementing. 467 U.S. 837 (1984). Furthermore, the Act specifically provides the Secretary with latitude in enforcing the statute. These factors compel the conclusion that if, as a policy reason or as a matter of the Service's regulatory expertise, the Secretary decided not to apply the take prohibition to GHG sources, such a decision would be entirely defensible as a matter of law.

In summary, it is inconsistent with the Endangered Species Act to list the American pika as threatened or endangered based on claims of the effects of climate change on the species' habitat, and the information that accompanies the May 7, 2009 Notice does not indicate that there other factors that have been established as grounds for a listing decision.

Thank you for considering these comments.

Sincerely,